Federal Court  Cour fédérale

Date: 20110421

Docket: IMM-781-10

Citation: 2011 FC 488

Ottawa, Ontario, April 21, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

TROY ISAAC GLEN

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), for judicial review of a decision by the Immigration Appeal Division (the Board), rendered on January 14, 2010, wherein the Board dismissed the applicant's appeal of a negative decision by a visa officer of an application for spousal sponsorship.

[2] The applicant requests an order quashing the Board's decision and remitting the matter back for reconsideration by a differently constituted panel.

Background

[3] Troy Isaac Glen (the applicant) is a thirty year old permanent resident of Canada, born in Guyana, who was sponsored by his mother in 2000.

[4] The applicant began dating Allison Antoine, a citizen of Grenada, in 2002. After discovering that she was pregnant, the applicant claims he proposed to her in March 2004. She later gave birth to their daughter on July 30, 2004. The couple married on June 4, 2005, ten days before Ms. Antoine was removed from the country following a negative refugee claim.

[5] The applicant applied to sponsor his wife, but this application was denied on July 10, 2006.

[6] While waiting for an appeal before the Board, the applicant visited his wife in December 2006 and again in December 2007. Following this visit, his wife gave birth to another daughter on September 7, 2007. Since his wife has been in Grenada, the applicant has regularly sent money to support her and their children.

[7] The applicant also has a child born on January 1, 2005, that was, he claims, the result of a one-time sexual encounter with a neighbour. He has the support amounts for this child garnished from his wages.

Procedural History

[8] The applicant has a long history of litigation concerning the sponsorship of his wife.

[9] In July 10, 2006, a visa officer found that the couple's marriage was not genuine. The officer was concerned that Ms. Antoine lacked knowledge of her sponsor. The officer also found problems with the date of the marriage, as the couple married two weeks before Ms. Antoine was deported from Canada, the lack of evidence on cohabitation and the unconvincing nature of the documentary evidence supporting the relationship.

[10] The applicant's appeal of the visa officer's decision was heard by the Board on April 15, 2008. The Board gave considerable weight to the fact that the couple have two children together. However, it found that this was not sufficient to discharge the onus of proving a genuine marriage. The Board found that the marriage was not genuine and was entered into primarily to assist Ms. Antoine in gaining status in Canada as a permanent resident. The Board highlighted the lack of documentary evidence supporting the claim of cohabitation, the evidence of communication between the couple was limited, the applicant's trips to Grenada were arranged only after the visa officer, during Ms. Antoine's interview, expressed concerns about the lack of visits, the applicant displayed a lack of knowledge about Ms. Antoine, the money sent by the applicant to Grenada "could be for any number of reasons", there is nothing in the immigration notes to show that the applicant attended any of Ms. Antoine's interviews with immigration officials prior to her removal and the couple married only days before her removal from Canada. The Board was not convinced

the couple was in a committed and exclusive relationship because the applicant fathered a child with another woman at a time when he was in a relationship with Ms. Antoine.

[11] The applicant appealed the Board decision and Mr. Justice James O'Reilly allowed the judicial review in *Glen v Canada (Minister of Citizenship and Immigration)*, 2009 FC 479. He held that the Board's treatment of the evidence was unsatisfactory and therefore unreasonable. Mr. Justice O'Reilly found that the applicant attempted to address many of the Board's concerns in his testimony, but that these explanations were not considered. Specifically, the applicant explained the lack of evidence of cohabitation and the short duration of phone calls. He addressed the "one-night stand" he had with another woman, which produced a child. Mr. Justice O'Reilly found that the applicant had presented evidence supporting his continued relationship with Ms. Antoine and that there was no basis for the Board to suggest that the two relationships were the same. Mr. Justice O'Reilly concluded that the failure to consider the applicant's explanations for many of the issues and to mischaracterize other evidence went to the reasonableness of the decision. He found that while it was open to the Board to question the cogency of the applicant's explanations, it had a duty to at least consider them.

The Board's Decision

[12] The Board conducted a *de novo* appeal on January 14, 2010. Once again, the Board found that the marriage was not *bona fide* and was entered into primarily for the purpose of gaining status or privilege under the Act.

[13] The Board was concerned by the lack of additional evidence, other than the testimony of the applicant, demonstrating a genuine relationship from June 2002 to June 2005. There are no pictures from this time and no witnesses were called to confirm the relationship.

[14] In response to this concern, the applicant claimed that any pictures he had of their time together in Canada were lost in the mail when he attempted to send them to the visa office. Ms. Antoine, however, claimed that these photos were lost in the move. The Board finds that this contradiction casts serious doubt on the evidence that these two individuals had a long term relationship.

[15] With regards to the timing of the marriage, the Board questioned why the applicant had waited so long before marrying Ms. Antoine. The applicant claims that he proposed to Ms. Antoine in March 2004 and their daughter was born in July 2004, but the couple did not marry until June 2005. The Board found that logistical problems such as cost and location must not have been a problem, because they were married in a small ceremony at Ms. Antoine's apartment. Rather, the Board concludes that the parties delayed marriage until it was certain that the applicant would not be allowed to remain in Canada and as such, the marriage was directly related to the immigration problems faced by Ms. Antoine.

[16] The Board recognized that the applicant voluntarily sent money on a monthly basis to Ms. Antoine, but the Board did not believe that this led, on its own, to a finding of a *bona fide* marriage between the applicant and Ms. Antoine.

[17] The Board also took serious issue with the fact that the applicant fathered a child with another woman shortly after the birth of his first child with Ms. Antoine. He has support for this child garnished from his wages as result of a court order. The applicant testified that this child was as a result of a “one-night stand” and that Ms. Antoine was aware of the situation. The Board noted, however, that he failed to present any other evidence, such as his wife’s testimony or the court order for his garnished child support to support his claims about the nature of the relationship with the other woman. The Board found that the evidence presented by the applicant lacked credibility.

[18] The Board was also not convinced of the *bona fide* nature of the marriage because of the applicant’s infrequent visits to see his wife and children in Grenada. At the time of the Board hearing in November 2009, the last time he had visited Grenada was in January 2008. The applicant testified that he has not gone back since then because he could not afford to do so. The Board believed that if he was truly in a *bona fide* relationship, “he would have done everything he possibly could” to go back to Grenada.

[19] Although the applicant submitted lengthy phone records to demonstrate contact with his wife, the Board was concerned that calls to Grenada usually lasted only one minute. The applicant testified that he would normally call to see if Ms. Antoine was home and then call her back using a calling card, which was much cheaper. The applicant did not, however, provide evidence of these calling cards or trace the numbers called using these cards. Therefore, the Board found that the applicant failed to adequately explain why the calls were short and why there was no other communication, other than the occasional letter or card.

[20] For the Board, however, the "most telling evidence" was that in response to Minister's counsel's questions, the applicant stated, "I would not have gotten her [Ms. Antoine] pregnant if I did not love her." Minister's counsel pointed out that he also got the mother of his child born in January 2005 pregnant as well, but the applicant could not explain the difference between the two relationships. The Board believed that this comment undermined the applicant's claims that the marriage was genuine.

[21] Finally, the Board notes that the applicant did not accompany Ms. Antoine to any of her immigration interviews that immediately preceded her deportation. The Board would expect that in a *bona fide* relationship, the applicant would have been there to support his spouse.

[22] The Board concludes that although the fact that the couple has two children together is important, this does not necessarily lead to the finding of a *bona fide* marriage. The applicant did not fulfill his onus of providing enough evidence to convince the tribunal.

Issues

[23] The issues are as follows:

1. What is the applicable standard of review?
2. Did the Board exhibit a reasonable apprehension of bias?
3. Did the Board err in its finding that the applicant's marriage was not genuine and was entered into primarily for the purpose of acquiring status?

Applicant's Written Submissions

[24] The applicant submits the Board exhibited a reasonable apprehension of bias and failed to act impartially, have an open mind or provide a fair hearing by accepting into evidence material submitted in support of the earlier judicial review, including the transcript of the previous hearing. This was despite the fact that the first Board decision was remitted back by the Federal Court due to mischaracterizations of evidence.

[25] The applicant further submits that the Board erred on several grounds failing to pay heed to Mr. Justice O'Reilly's decision and failing to correct the errors made in interpreting the evidence. As a result, the applicant submits that there are so many errors in the decision that it affected the outcome.

[26] Specifically, the applicant is concerned about the Board's findings pertaining to the following issues.

[27] The applicant submits that the Board erred in finding that there was a lack of evidence of a relationship from June 2002 to June 2005. The applicant included a sworn affidavit explaining both the relationship and the reasons for the lack of evidence of the relationship. The Board had a duty to analyze all the evidence and explain why it prefers to rely on other materials. Further, the fact that he did not call witnesses to confirm his relationship should not be fatal to his appeal. The Board had no real reason for rejecting his explanations in testimony and affidavits because there was no

conflicting evidence, the explanations were not implausible and they were consistent with rationality and common sense.

[28] The applicant submits that he adequately explained the factors affecting the timing of the marriage and it was an error to draw a negative inference from the timing. He also explained the lack of evidence of communication between the applicant and his wife.

[29] The applicant submits that the Board's decision ignores the holding of Mr. Justice O'Reilly that there was no basis for characterizing the money sent as anything other than support for his wife and children.

[30] The applicant submits that the finding concerning his "one-night stand" ignores Mr. Justice O'Reilly's statements that there was no basis to suggest that the two relationships were the same.

[31] The applicant further submits that it was unreasonable for the Board to find that the applicant's claims of financial restraints were not enough to justify the infrequency of his visits to his wife and children.

[32] The applicant submits that the Board erroneously relied on documents concerning his wife's sister and not his wife in finding that the applicant did not support his wife in the immigration process. The applicant's affidavit makes it clear that he understood his wife's immigration status and the possibility of her removal early in his relationship.

Respondent's Submissions

[33] The respondent submits that the applicant failed to show that an informed person, viewing the matter realistically and practically, would conclude that it is more likely than not that the decision maker would not decide fairly, which is the test set out by the Supreme Court for the reasonable apprehension of bias (see *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394). The applicant has not provided any concrete examples to support his allegation that the Board was biased.

[34] The respondent submits that none of the errors alleged by the applicant give rise to an arguable case for judicial review when analyzed either individually or as a whole.

[35] The respondent submits that the Board did not ignore the applicant's testimony about his contact with his wife, but that there was no other evidence to demonstrate their relationship before their marriage. Furthermore, the applicant gave contradictory evidence and it was reasonable for the Board to conclude that these contradictions undermined the applicant's credibility on this issue.

[36] The respondent submits that the Board's concerns about the timing of the applicant's marriage are reasonable and were not adequately addressed by the applicant.

[37] The respondent submits that the Board's conclusion that the support is only for the support of the children is reasonable, particularly considering that the applicant is also paying child support to his child born to another woman.

[38] The respondent submits that it was reasonable for the Board to have concerns about the applicant's relationship with another woman with whom he had a child. The applicant failed to provide evidence other than his own testimony and where credibility is a concern, it is not unreasonable for the Board to require corroborating evidence (see *Ortiz Juarez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 288 at paragraph 7 and *Adu v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 114).

[39] The respondent calculated that the applicant had sufficient funds to visit his wife and children and it was reasonable for the Board to state that if there was a genuine relationship, he would have done so.

[40] Ultimately, the respondent submits that it is up to the applicant to provide evidence that he was communicating with his wife. His failure to provide convincing evidence that explained the brevity of phone calls and lack of mail or e-mails meant that the Board's findings that this evidence indicated a lack of genuineness in the relationship was reasonable.

[41] In conclusion, the respondent highlights that the Board is entitled to make credibility findings based on contradictions in the evidence. The applicant's claim to a genuine marriage with his spouse was seriously undermined by the contradictions and lack of corroborating evidence.

Analysis and Decision

[42] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[43] Assessments of applications for permanent residence under the family class and genuineness of the marriage in particular, involve questions of mixed fact and law and the established standard of review is reasonableness (see *Natt v Canada (Minister of Citizenship and Immigration),* 2009 FC 238, 80 Imm LR (3d) 80 at paragraph 12).

[44] I wish to first deal with Issue 3.

[45] **Issue 3**

Did the Board err in its finding that the applicant's marriage was not genuine and entered into primarily for the purpose of acquiring status?

I have reviewed the Board's decision that the applicant's and Ms. Antoine's marriage was not *bona fide* and was entered into primarily for the purpose of getting status or privilege under the Act. I do not agree that the Board's decision was reasonable for the reasons that follow.

[46] The Board found that the applicant's and Mrs. Antoine's decision to get married just before she was removed to Grenada led to the conclusion that the marriage was because of Ms. Antoine's immigration problems. However, the applicant explained to the Board that he had proposed in March 2004 and that he and Ms. Antoine had been preparing for the wedding since before she received her notice of removal and her negative PRRA decision. I find the Board's handling of this explanation to be based on speculation that the delay could not have been about financial issues because Ms. Antoine quit her job after she became pregnant. However, the applicant testified throughout the hearing that he had financial difficulties. Ms. Antoine's leaving her job because of pregnancy does not imply that the applicant did not have financial concerns.

[47] Further, the Board's decision seemed to say that the support payments made by the applicant to his family in Grenada did not necessarily demonstrate a *bona fide* marriage because he also made Court ordered support payments to the mother of his child through the "one night stand." I do not accept that these two situations can be analogized. For example, the payments made to the applicant's wife and children in Grenada were voluntary. Further, I do not believe that the Court ordered support payments can have any impact on the assessment of the *bona fides* of the applicant's marriage. As such, I find this aspect of the decision to be unreasonable.

[48] I do not accept that simply because the applicant had what he called a "one night stand" would support a conclusion that the marriage was not valid. In my view, on the factual basis of this case, the two relationships are not related.

[49] As to the Board's concern that the applicant's lack of visits to Grenada to see his family somehow impacted on the *bona fides* of his marriage, I cannot agree as the applicant explained that he could not afford to travel to Grenada because of various expenses.

[50] For the above reasons, I find the Board's decision unreasonable.

[51] Because of my finding on this issue, I need not deal with the remaining issue.

[52] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[53] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

12.(1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	12.(1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

Immigration and Refugee Protection Regulations, SOR/2002-227

4.1 For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the foreign national has begun a new conjugal relationship with that person after a previous marriage, common-law partnership or conjugal partnership with that person was dissolved primarily so that the foreign national, another foreign national or the sponsor could acquire any status or privilege under the Act.	4.1 Pour l'application du présent règlement, l'étranger n'est pas considéré comme l'époux, le conjoint de fait ou le partenaire conjugal d'une personne s'il s'est engagé dans une nouvelle relation conjugale avec cette personne après qu'un mariage antérieur ou une relation de conjoints de fait ou de partenaires conjugaux antérieure avec celle-ci a été dissous principalement en vue de lui permettre ou de permettre à un autre étranger ou au répondant d'acquérir un statut ou un privilège aux termes de la Loi.
117.(1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117.(1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

(a) the sponsor's spouse, common-law partner or conjugal partner;	a) son époux, conjoint de fait ou partenaire conjugal;
(b) a dependent child of the sponsor;	b) ses enfants à charge;
(c) the sponsor's mother or father;	c) ses parents;
(d) the mother or father of the sponsor's mother or father;	d) les parents de l’un ou l’autre de ses parents;
(e) [Repealed, SOR/2005-61, s. 3]	e) [Abrogé, DORS/2005-61, art. 3]
(f) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is	f) s’ils sont âgés de moins de dix-huit ans, si leurs parents sont décédés et s’ils n’ont pas d’époux ni de conjoint de fait :
(i) a child of the sponsor's mother or father,	(i) les enfants de l’un ou l’autre des parents du répondant,
(ii) a child of a child of the sponsor's mother or father, or	(ii) les enfants des enfants de l’un ou l’autre de ses parents,
(iii) a child of the sponsor's child;	(iii) les enfants de ses enfants;
(g) a person under 18 years of age whom the sponsor intends to adopt in Canada if	g) la personne âgée de moins de dix-huit ans que le répondant veut adopter au Canada, si les conditions suivantes sont réunies :
(i) the adoption is not being entered into primarily for the purpose of acquiring any status or privilege under the Act,	(i) l’adoption ne vise pas principalement l’acquisition d’un statut ou d’un privilège aux termes de la Loi,
(ii) where the adoption is an international adoption and the country in which the person resides and their province of	(ii) s’il s’agit d’une adoption internationale et que le pays où la personne réside et la province de destination sont parties à la

intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and

Convention sur l’adoption, les autorités compétentes de ce pays et celles de cette province ont déclaré, par écrit, qu’elles estimaient que l’adoption était conforme à cette convention,

(iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption

(iii) s’il s’agit d’une adoption internationale et que le pays où la personne réside ou la province de destination n’est pas partie à la Convention sur l’adoption :

(A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and

(A) la personne a été placée en vue de son adoption dans ce pays ou peut par ailleurs y être légitimement adoptée et rien n’indique que l’adoption projetée a pour objet la traite de l’enfant ou la réalisation d’un gain indu au sens de cette convention,

(B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption; or

(B) les autorités compétentes de la province de destination ont déclaré, par écrit, qu’elles ne s’opposaient pas à l’adoption;

(h) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative

h) tout autre membre de sa parenté, sans égard à son âge, à défaut d’époux, de conjoint de fait, de partenaire conjugal, d’enfant, de parents, de membre de sa famille qui est l’enfant de l’un ou l’autre de ses parents, de membre de sa famille qui est l’enfant d’un enfant de l’un ou l’autre de ses parents, de parents de l’un ou l’autre de ses

who is a child of the mother or father of that mother or father	parents ou de membre de sa famille qui est l’enfant de l’un ou l’autre des parents de l’un ou l’autre de ses parents, qui est :
(i) who is a Canadian citizen, Indian or permanent resident, or	(i) soit un citoyen canadien, un Indien ou un résident permanent,
(ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.	(ii) soit une personne susceptible de voir sa demande d’entrée et de séjour au Canada à titre de résident permanent par ailleurs parrainée par le répondant.

FEDERAL COURT

SOLICITORS OF RECORD

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